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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 356

GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY and OWENS-ILLINOIS GLASS COMPANY,

Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, ILLINOIS COMMERCE COMMISSION, and INTERSTATE NATURAL GAS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, entered on July 15, 1950, in the case there entitled *"Interstate Natural Gas Company* v. *Federal Power Commission, et al."*, No. 10701 on the docket of said court.

OPINION BELOW

The opinion of the Court of Appeals (R. 131) is reported in 181 F. 2d 833.

JURISDICTION

The judgment and decree of the Court of Appeals was entered on July 15, 1950 (R. 141). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals obey the mandate of this Court issued on the opinion in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. 577, when, after making the full agreed provision for retail customers of public utility customers of respondent Mississippi River Fuel Corporation out of the impounded fund arising from reduction of Interstate's rates to Mississippi, it orderd paid to Mississippi the remaining portion of the impounded fund, which admittedly was attributable to sales by Mississippi to petitioners, direct industrial customers, although: (1) this Court ruled that Mississippi could not participate in the fund except under conditions which indisputably did not exist, (2) petitioners have had no benefit from the rate reduction and Mississippi will receive a windfall; and (3) petitioners probably could have obtained such benefit, absent the impounding order, either through contract revision or by Illinois Commision action?

STATUTES INVOLVED

The provisions of the Illinois statutes hereafter discussed are printed in Appendix A, hereto, *infra* pp. 19-20.

STATEMENT

Petitioners are all manufacturers having plants in Illinois in the Alton-East St. Louis area and purchase natural gas for consumption directly from respondent

Mississippi River Fuel Corporation, the only interstate natural gas company serving the St. Louis metropolitan area (R. 89). They were not parties to the case when it was last here.

The Federal Power Commission ordered a reduction of the rates of Interstate Natural Gas Company. Pending review, the court below stayed the reduction order and required Interstate to deposit monthly the excess of the old over the new rates in the registry of the court. The stay order was in effect from June, 1943 to October, 1947 (R. 12). After affirmance of the Commission order (156 F. (2d) 949 and 331 U. S. 682), the court below directed that the impounded funds be distributed to Interstate's direct customers, who were also interstate pipeline companies, including respondent Mississippi (166 F. (2d) 796).

This Court reversed with directions, 336 U. S. 577. Four opinions were delivered. The opinion of the Court was by Mr. Justice Douglas, in which the Chief Justice and Mr. Justice Reed joined. Mr. Justice Frankfurter wrote a concurring opinion. The opinion of Mr. Justice Jackson, concurred in by Mr. Justice Burton, stated "[we] view this case in a different light than do any of our brethren but we have joined in the judgment and the opinion of Mr. Justice Douglas because we deem it important that instructions to the court below carry a concurrence of a majority of this Court" (336 U. S. 590). The opinion of Mr. Justice Black concurred in the reversal but dissented from the instructions. It was joined in by Mr. Justice Murphy and Mr. Justice Rutledge.

After the coming down of the mandate, Mississippi submitted a plan for distribution of the portion of the impounded fund allocable to sales to it by Interstate (R.

1). The amount involved was $1,484,582.53 (R. 13). $300,898.66 was to be paid to public utility customers of Mississippi for distribution to their customers and $244,-103.70 was to be paid to Mississippi by way of reimbursement for a reduction in an equal amount which it had passed on to its public utility customers (R. 13). These payments were approved by all parties.

The remaining $939,580.17 was allocated to sales to industrial customers by Mississippi (R. 13). This amount was to be paid to Mississippi.

An order to show cause was directed against all interested parties, which for the first time brought the industrial customers into the case (R. 40). Petitioners (R. 46, 54, 62, 81) and other industrials (R. 52, 69, 78, 80, 128) sought payment out of the fund of their allocated shares. Petitioners' claims total $304,452.45. The claims of other industrial customers, petitioners in the companion case, total $163,166.34. Other industrial customers, to whom $454,-670.30 was allocated, either signed waivers solicited by Mississippi or did not respond to the order to show cause (R. 95).

The allocation of amounts to both public utility and industrial customers (including the amounts claimed by petitioners) was made by Mississippi in conjunction with Federal Power Commission (R. 131) and was not disputed by any party to the proceeding, except Illinois Commerce Commission which contended allocation should be on a revenue basis (R. 42).[1]

The Federal Power Commission, recognizing its lack of jurisdiction over sales to industrial customers, took no position as to distribution of the amount allocated to indus-

[1]The record does not show what difference this would make, but Mississippi and Federal Power Commission have stated it would be *de minimis*.

trial customers (R. 13-14).[2] The Missouri Commission recognized that it had no statutory jurisdiction over sales to industrials (R. 26). The Illinois Commission contended that no part of the fund (except the $244,103.70 already passed on) should be paid to Mississippi, that the industrials should receive their allocable shares, or if this was not done, the entire amount should be paid to domestic consumers (R. 42-43).

The Court of Appeals adopted the Mississippi plan and ordered the entire amount allocated to industrial sales paid to Mississippi (R. 141).

SPECIFICATION OF ERRORS

The Court of Appeals erred in failing to comply with the mandate of this Court issued on the opinion in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. 577, in the following respects:

1. By failing to hold that respondent Mississippi was not entitled to participate in the impounded fund, since its rates were not unreasonably low and it did not pass on the benefit of the rate reduction to its customers, and that petitioners' allocated shares should be paid to them;
2. By failing to hold that the equitable principles stated by this Court required payment to petitioners of their allocated shares of the impounded fund;
3. By failing to hold that petitioners were entitled to their allocated shares of the impounded fund because of probable operation of Illinois law in the absence of the stay order.

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[2]The contrary statement in the Court of Appeals opinion, 181 F. 2d 834, note 3, R. 132, is incorrect.

REASONS FOR GRANTING THE WRIT

Petitioners submit that the writ should be granted in order to enforce compliance with the prior mandate of this Court, and because the question involved is an important one in the administration of the Natural Gas Act (15 U. S. C. 717 *et seq.*).

1. The decree of the Court of Appeals fails to carry out the mandate of this Court and should be corrected.

Except for the payment of $300,898.66 to public utility customers, consented to by Mississippi, the present order of the Court of Appeals is not different from the prior order, which was set aside here.

> "It is well understood that this court has power to do all that is necessary to give effect to its judgments" *B & O Ry. Co.* v. *United States*, 279 U. S. 781, 785.

It is submitted that the prior opinion of this Court definitely ruled that absent certain conditions which it is now indisputably established do not exist, Mississippi was to be precluded absolutely from participation in the fund, and that under the facts as now developed, the portion of the fund attributable to sales to petitioners was payable to them. Even if it should be considered that the opinion is not subject to such interpretation, application of either the equitable principles there announced or of Illinois law as there required, made it mandatory on the court below to award petitioners their allocated shares of the fund.

(a) *The plain language of the opinion precludes payment to Mississippi and requires payment to petitioners.*

This Court pointed out that Mississippi and the other pipe-line customers of Interstate were subject to regulation under the Natural Gas Act and that accordingly:

> "The claims of these pipe-line companies to the fund are therefore determinable *solely with reference to federal law,*[3] * * * We may not therefore sustain the action of the Court of Appeals unless it is clear as a matter of *federal law* that the pipe-line companies are entitled to the fund" (336 U. S. 580-1).

This Court then stated the federal law to be that the pipe-line companies might be entitled to all or part of the reductions if their rates had been unreasonably low, which would not be presumed, or if the benefit of the rate reduction had been passed on to their customers (336 U. S. 581-2).

It was then said:

> "* * * But *apart from those exceptions,* it is the duty of the court to *look beyond* those companies for the rightful claimants of the fund" (336 U. S. 582).

In the subsequent proceedings below, Mississippi made no attempt to show that its rates to any class of customers were unreasonably low. On the contrary, it was made to appear that they were high. On the basis of 1943 operations, the Federal Power Commission ordered a reduction of Mississippi's rates to utility customers, even on the basis of the high Interstate rates, and found that for that year Mississippi's revenues of $5,745,218 from industrial customers were $1,165,791 in excess of the amount necessary to earn a 6% return on that part of its business (4 F. P. C. Repts. 340, 358). From 1943 through 1947, revenues, operating expenses and net earnings of Mississippi were substantially level, except for increase in each in 1947 (R. 88).

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[3]All emphasis is ours.

Mississippi likewise made no attempt to show that the benefit of the Interstate reduction had been passed on to any of its customers, except the amount of $244,103.70 passed on to public utility customers, which is allowed for in the decree below and is not contested. Rates to industrial customers were not reduced (R. 90).

That the court below was to "look beyond" Mississippi if it could not come within either of the two exceptions is further emphasized by other parts of the opinion. The Court speaks of the argument that "the federal court could not *by-pass* the pipe-line companies without undertaking to pass on the reasonableness of the rates which they have charged * * *" (336 U. S. 582). There would have been no reason to use the term "by-pass" if payment was not to be made beyond the pipe-line companies. Further it is said: "The problem is somewhat more complicated if distribution of the fund is to be made to claimants *other* than the pipe-line companies" (336 U. S. 583). This again clearly contemplates payment beyond the pipe-line companies. It is then said that if "local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it" (336 U. S. 583). It had already been stated that the claims of the pipe-line companies were determinable "solely with reference to federal law", so that in directing application of local law, the reference necessarily was to claimants beyond the pipe-line companies.

Applied to the facts as developed before the court below, the direction to "look beyond" Mississippi could mean only payment to the industrial customers. Mississippi had wholly failed to show that its rates were unreasonably low or that it had passed on the benefit of the reduction. All questions of allocation had been settled by agreement of

the parties.[4] The distributing companies and their customers were to receive the amounts agreed upon by those companies and the federal and state commissions.[4] The remaining issue was strictly between Mississippi and its industrial customers. If payment was not made to the industrial customers it could be only to Interstate, which was not "beyond" Mississippi, clearly had no right and had disclaimed (R. 120), or to the public utility customers, with the result of their receiving more than they were entitled to or any public body claimed for them (except for the secondary claim of the Illinois Commission).

The Court of Appeals not only ignored the direction to "look beyond" Mississippi; it applied principles which stopped just short of holding that Mississippi had an absolute right to the fund.

It said that "prima facie" the moneys belonged to Mississippi (181 F. 2d 836, R. 136) and that a "positive burden" rested on the industrials to show a right of recovery (181 F. 2d 837, note 8, R. 138).

Thus, although this Court directed that the fund should not be paid to Mississippi, the Court of Appeals put Mississippi in a position of primary right from which it could not be removed except by a clear and convincing showing. This Court having pointed out that there could be no certainty as to what would have happened in the absence of the stay order and that the matter was one of "prognostication" (336 U. S. 584), the rules laid down by the Court of Appeals made it practically impossible for it to find for anyone but Mississippi.

The alleged rule of prima facie right of Mississippi was based only on a passage from the opinion of Mr. Justice

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[4]Except insofar as it can be said that the Illinois Commission disagreed. See pages 4 and 5 *supra*.

Jackson, which opinion was expressly stated to be in disagreement with the opinion of the Court.

The Court of Appeals based its rule of "positive burden" on the following passage from this Court's opinion:

> "* * * We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority" (336 U. S. 583).

The passage clearly has no bearing on any matter of "positive burden", but merits discussion for another reason.

The Court of Appeals apparently concluded that this sentence meant the industrial customers could recover only if a contract right to rate adjustment existed (the absence of such right is undisputed) or if there was certainty that relief could have been obtained under local regulatory authority. Petitioners say that they were entitled to relief by application of Illinois law (*infra* pp. 14-17), but maintain that they were so entitled regardless of Illinois law.

In giving such effect to the quoted statement, the Court of Appeals overlooked the fact that it then had been definitely established that Mississippi could not come within either of the exceptions stated by this Court and accordingly could not participate in the fund. The Court of Appeals also failed to note that the passage is in a paragraph predicated on non-participation by the pipe-line companies, the first sentence of which is: "The problem is somewhat more complicated if distribution of the fund is to be made to claimants *other* than the pipe-line companies" (336 U. S. 583). The statement thus dealt with the relative rights of industrial and other classes of customers. Complete provision having been made for distributing companies and their

customers, there was no possible controversy before the Court of Appeals between customers but only between the industrial customers and Mississippi and that controversy was controlled by previous statements of this Court.

The Court of Appeals also intimated (181 F. 2d 837, note 8, R. 137) that industrial customers were not included in the "ultimate consumers" which this Court said were entitled to the benefit of the rate reductions (336 U. S. 581). If the Court of Appeals was correct, there would have been no occasion for the subsequent discussion in this Court's opinion of possible factors affecting the rights of industrials in the fund.

It may be argued that the absence of federal regulation of direct sales to industrial customers removes them from the protection of the Act. However, in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission,* 332 U. S. 507, the Court pointed out that Federal jurisdiction over both direct industrial sales and sales to customers of local distributing companies was not asserted for the same reason in each case: the existence of state power to regulate (p. 514, 517). The purpose was to confirm and aid state control in each case as part of a comprehensive scheme (p. 520-1). Accordingly, if direct industrial sales are not entitled to the protection of the Act in a proper case, the same would be true of sales to customers of local distributors. Furthermore, service to direct customers is not outside the Act. Interstate transportation without sale for resale is subject to the Act. *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U. S. 464. The construction of facilities for industrial service is subject to Federal Commission approval. *City of Detroit* v. *Panhandle Eastern Pipeline Co.,* 5 F. P. C. 43.

(b) *The equitable principles which the court below was directed to apply equally required an order in favor of petitioners.*

As already shown, petitioners believe that this Court determined finally that Mississippi was not to participate in the fund if it could not come within either of the two exceptions mentioned. Even if the opinion is not so interpreted, it is still true that application by the court below of the equitable principles stated in this Court's opinion should have resulted in payment to petitioners.

The Court stated that it was the duty of the court below

> "* * * 'to correct that which has been wrongfully done by virtue of its process.' * * * That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action" (336 U. S. 582).

and

> "* * * When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. * * * It assumes the duty to make disposition of the fund in accordance with equitable principles * * *" (336 U. S. 582-3).

Clearly, Mississippi has suffered no loss but on the contrary has received a windfall and thus is outside the class of possible recipients specified by this Court. On the other hand, the stay order deprived the industrial customers of any right to seek lower rates on the basis of the reduction order. Their contracts terminated and were renewed or were terminable during the stay period (R. 48, 55, 63). No reduction of rates was effected. There is no certainty that they would have been successful, but as the Court pointed out, "no one can know for a certainty" what would have

happened in the absence of the stay order (336 U. S. 584). The probable result is that suggested by the Court: "Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility" (336 U. S. 581). The equities are thus clearly with petitioners.

Award of the fund to Mississippi is also inequitable because it defeats the basic purpose of the Act. The fund was created not by any effort or skill of Mississippi but by operation of a national law intended to protect consumers from pipe-line companies. If the fund so created is to be turned over as a windfall to a company regulated for such purpose, the Act is surely "an exercise in futility."

Furthermore, at the time of the impounding order, Interstate and Mississippi were affiliated, Standard Oil of New Jersey owning 53% of the voting stock of Interstate and 22% of Mississippi (See Record, pp. 250-254 in *Interstate Natural Gas Co.* v. *Federal Power Commission,* No. 733, October Term, 1946). If the effect of an impounding order is to keep within the family charges which the Power Commission has held to be too high, it is again "an exercise in futility."

The court below disposed of the equitable aspect of the case by saying that the rates had been fixed by arms length bargaining (181 F. 2d 838, R. 138). This ignores the fact that Mississippi has a monopoly in the St. Louis area and that by virtue of the certificate provisions of the Natural Gas Act (15 U. S. C. 717 f(c)), there can be no competition without Federal Power Commission permission. It also ignores the fact that the stay order deprived the industrials of any opportunity to demand lower rates on the basis of lower costs.

The Court of Appeals also suggested that if Mississippi is not to receive the fund because of absence of loss, by the same token the fund should be passed on to customers of the industrials, *ad infinitum* (181 F. 2d 838, R. 139). It is submitted that there is a clear distinction between paying the fund to a regulated monopoly company and passing that sum on to its customers who are engaged in competitive businesses. Certainly no such consideration has prevented refunds to business customers of distributing utilities.

(c) *The Court of Appeals failed to give effect to Illinois law.*

Petitioners submit that proper application of Illinois law as required by the opinion would have equally brought forth a decision in their favor.

As one means of disposition of the fund, the opinion of this Court directed the court below to ascertain whether the local law provided a standard for distribution of the fund and if it did, to apply it so as to achieve the result which would have occurred except for the impounding order (336 U. S. 583-4).

Relevant parts of the Illinois statutes appear in Appendix A hereto. These statutes define the term public utility as including any person operating any property used "for the conveyance of oil or gas by pipe line" (Sec. 10, p. 19); give the Commission power to fix just and reasonable rates and reduce rates that are unreasonable, on its own initiative or on complaint (Sec. 41, pp. 19-20); and confer jurisdiction to make reparation orders (Sec. 76, p. 20).

Panhandle Eastern Pipe Line Co. v. *Public Service* Commission, 332 U. S. 507, establishes that a state may constitutionally exercise this power as to sales to industrial customers by interstate pipe-line companies.

It thus appears that absent the stay order, petitioners would have been in a position to apply to the Illinois Commission for a reduction in rates or reparations or both, on the basis of the reduced cost to Mississippi. The existence of contracts between the parties would not have precluded this relief. *Jefferson Building Corporation* v. *Central Electric Light Co.*, 350 Ill. 237; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109.

As already shown (*supra* p. 7), the earnings of Mississippi on its industrial business during the impounding period, even on the old Interstate rates, were far in excess of a reasonable return. On these facts, the probability that the Illinois Commission would have granted reductions or reparations at least to the amount of the Interstate reduction is so strong as to have required the court below to make an award to petitioners in the amount of their allocated shares.

Petitioners' position is supported by an order of the Illinois Commission made in 1950 asserting jurisdiction over Mississippi (R. 59), and as to right of recovery, by the position of the Illinois Commission in the Court of Appeals (R. 42-43).

The Court of Appeals (181 F. 2d 838, R. 139-40) rejected petitioners' contention because of a 1949 order of the Illinois Commission determining it did not have jurisdiction over Mississippi (R. 28), apparently on the theory that since it was closer to the impounding period, it indicated what the decision would have been then.

Since it is clear that an order of an administrative body as to status is legislative in character and involves no *res judicata* (*People* v. *Biggs*, 402 Ill. 401; *State Commision* v. *Wichita Gas Co.*, 290 U. S. 561), the Court of Appeals was

not entitled to regard the 1949 order as evidencing either the probable holding of the Illinois Commission in 1943 to 1947 or the correct rule, particularly when the 1950 order and the position of the Commission in this case are to the contrary.

Regardless of the conflict, the duty of the Court of Appeals was to decide the question. The decision should not have been a difficult one in view of the clear statutory provisions.

The court below also said it could not find that "clear and speedy state remedies are available" (181 F. 2d 839, R. 140). This is correct, but not for the reason stated. The only possible proceeding before the Illinois Commission at this late date would have been one for reparations, but the statute (Appendix A, Sec. 76, p. 20) contains a one year limitation. However, the absence of a present state remedy did not mean that the court below should turn the money over to Mississippi. The direction of this Court was that the court below decide for itself (336 U. S. 584).

By holding that Mississippi was prima facie entitled to the fund and that a positive burden rested on the industrial customers, the Court of Appeals effectively undid what had been accomplished by the reversal of its prior order.

It ignored the direction that it should "look beyond" Mississippi. It nullified the direction to do equity by starting with a strong presumption in favor of Mississippi and requiring the industrials to overcome a positive burden. By adopting those standards, it made meaningless the direction of this Court to apply as best it could information from available sources, including local law and regulatory authorities.

This Court recognized that "no one can know for a certainty" (336 U. S. 584) what would have happened in the absence of the stay order. In spite of this, the Court of Appeals by placing a "positive burden" on the industrials to establish their rights, required an exactitude of proof not contemplated by this Court and concededly impossible of attainment.

The net result was the same as under its prior order except on matters as to which Mississippi yielded.

It is respectfully submitted that this is an outstanding example of the need of action by this Court to insure obedience to its mandate.

2. The question involved is an important one in the administration of the Natural Gas Act.

It is respectfully submitted that it is of prime importance that the question here involved should be settled and the rights of industrial customers of natural gas companies in impounded funds clearly defined. The operations of natural gas companies are constantly expanding and industrial use is increasing. Interconnections between primary pipe lines and secondary sellers are becoming more numerous. It can be anticipated that rate cases under the Natural Gas Act will continue for many years in the future. Such cases involve large sums of money and many parties. It is of great public importance that the rights of the companies and their customers be clarified by a definitive pronouncement of this Court.

By granting the writ in the prior instance, this Court recognized the importance of settlement of these problems. The Court of Appeals' decision is so at variance with the

opinion of this Court that the questions will be even more unsettled and confused than before if the Court of Appeals' decision is not reviewed and corrected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

Chapter 111 2/3 Smith-Hurd Illinois Statutes

Sec. 8:

"The Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the Commission and with the charter and franchise requirements."

Sec. 10:

"The term 'public utility,' when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever * * * that now or hereafter:

"(a) May own, control, operate, or manage, within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used * * * for the conveyance of oil or gas by pipe line; * * *"

Sec. 41:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates

or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, * * * are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

"The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof. * * *"

Sec. 76:

"When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

* * * * * *

"All complaints for the recovery of damages shall be filed with the Commission within three years from the time the produce, commodity or service as to which complaint is made was furnished or performed, * * *"

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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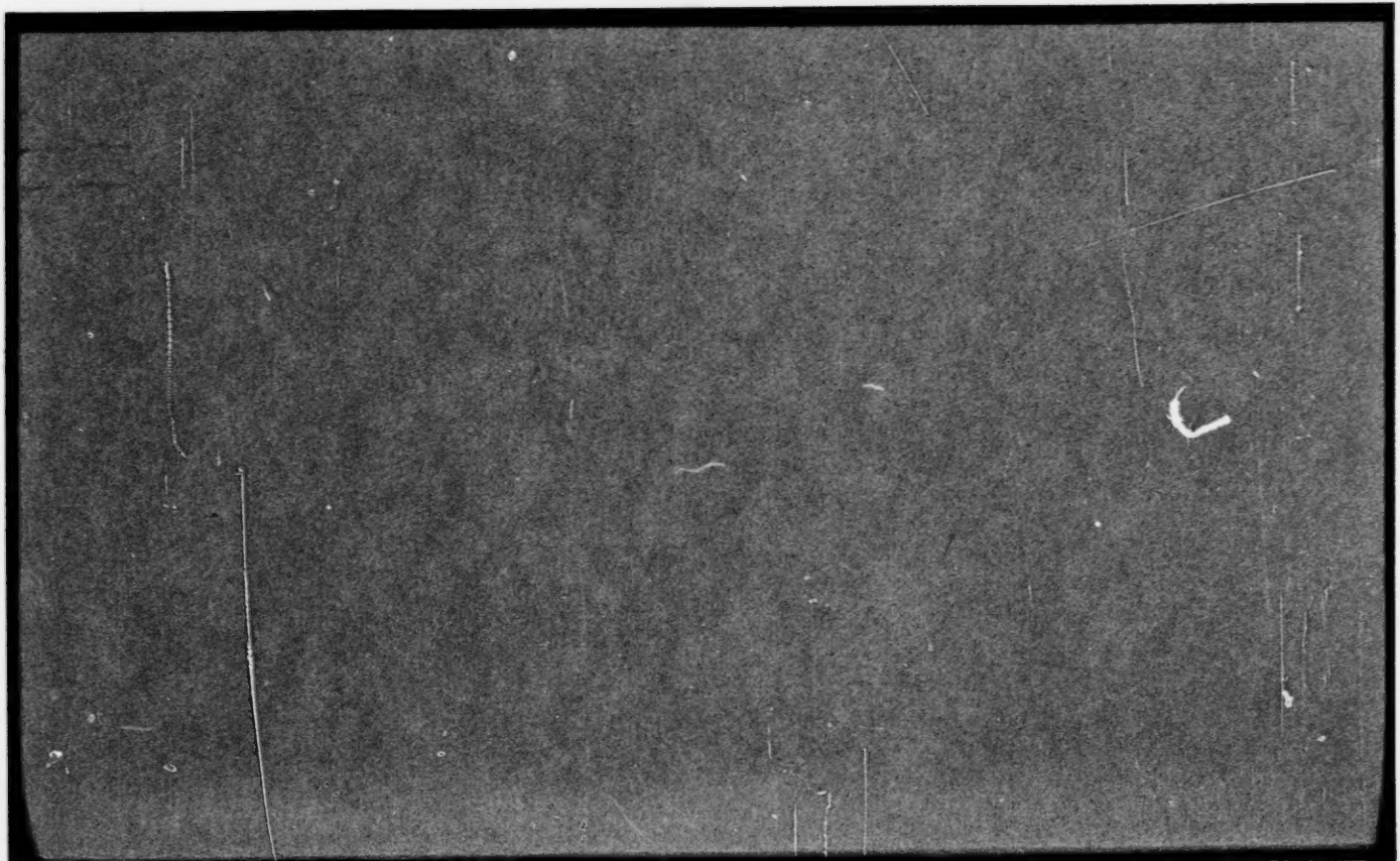

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 356.

GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY and OWENS-ILLINOIS GLASS COMPANY,

Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ILLINOIS COMMERCE COMMISSION and INTERSTATE NATURAL GAS COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

Opinion Below.

The Opinion of the United States Court of Appeals for the Fifth Circuit (R. 131) is reported at 181 F. 2d 833.

Jurisdiction.

The Opinion and Judgment of the Court of Appeals was filed May 9, 1950 (R. 131). The formal Decree adopted in said Judgment was entered July 15, 1950 (R. 141). Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C., Section 1254(1).

Question Presented.

Where a natural-gas company sells gas for resale and also for consumption, may it be awarded overcharges paid by it to a supplying natural-gas company when the amount of such overcharges concededly relates to natural gas purchased for direct sale for industrial consumptive use if no local law or regulatory process inhibits such distribution and the privately negotiated arms length contract of sale to the industrial consumer does not provide for a reduction in price?

Statute Involved.

Section 1(b) of the Natural Gas Act (52 Stat. 821, (1938), 15 U. S. C., §717(b)):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement.

Mississippi River Fuel Corporation ("Mississippi"), the Respondent herein, sells gas for two purposes: (1) to industrial companies such as petitioners for direct consumption by them, and (2) to public utility distribution companies for resale. Mississippi proposed to the court below a plan of distribution whereby all of the excess charges paid by it to Interstate Natural Gas Company,

Incorporated ("Interstate") for gas which was sold for resale would be paid to the public utility distribution companies for distribution to ultimate consumers or otherwise as proper state commissions might direct (R. 11-20, 143).

As to the amount of excess charges paid by Mississippi for gas sold directly by it to industrial consumers, Mississippi made claim in the Court below for the entire amount. This was done on the basis that all direct industrial consumers of gas purchasing from Mississippi were located either in the State of Missouri or the State of Illinois. The Public Service Commission of Missouri had found on December 22, 1948 that it did not possess statutory regulatory authority over the sales of natural gas by Mississippi for consumption (*In the Matter and Jurisdiction to Regulate Direct Sales of Natural Gas for Industrial Uses by Mississippi River Fuel Corporation,* Case No. 11,255, Mo. Pub. Serv. Comm., Dec. 22, 1948) (R. 26-27). The Illinois Commerce Commission had found on January 14, 1949 that it did not possess statutory regulatory authority over such sales (*Illinois Commerce Commission* v. *Mississippi River Fuel Corporation,* 77 PUR NS 12 (Ill. Com. Comn., 1949)) (R. 28-35). A subsequent citation against Mississippi to show cause why its sales for direct consumption should not be regulated by that Commission has not yet been heard (R. 59-62). Another basis, confirmed by a finding of the Court below after admission to that effect by all parties, was that there were no contractual provisions in the gas sales contracts between Mississippi and direct consumers of its gas relating to any refund or adjustment of price on account of a decrease in the cost of the commodity (R. 131-134).

The facts as otherwise set forth in the petition are substantially correct except that petitioners attribute to the Court below an incorrect statement which the Court in fact

did not make (petition, pp. 4-5, fn. 2). While the Federal Power Commission in the stipulation (R. 13-14) did not take any position as to the distribution of amounts representing volumes of gas sold for direct consumption, in the memorandum brief of the Federal Power Commission (R. 95-96, 99-102) the position of that body was stated and fully justified the Court's comment which petitioners claim to be incorrect.

While the Court below adopted Mississippi's suggested decree, the Court conducted a hearing and had this matter fully argued before it and after weighing the equities and reconstructing the situation which would have pertained had no Stay Order been granted, decided that Mississippi was entitled to the funds representing excess charges paid for gas purchased by it and sold directly for consumption for industrial purposes only. There is not involved here one dollar of amounts paid in excess charges for gas sold by Mississippi to utility distribution companies for resale to domestic and other consumers. Therefore there is no question here of refunds not having been made in full compliance with the rate regulatory jurisdiction of the Federal Power Commission (Natural Gas Act, §1(b), 15 U. S. C. §717(b)) or any other Federal law.

Petitioners claims represent a total of $304,452.45 out of the total of $939,580.17 of excess charges paid by Mississippi for gas sold directly to industrial consumers. The four petitioners in this docket along with the five petitioners in the petition in No. 357 represent the total of only nine direct industrial customers of Mississippi who claim a right in the impounded funds and their total claims amount to $467,618.79 (petition, p. 4). Mississippi sells gas to fifty-five direct industrial customers, of whom twenty-two recognized that they had no claim; seventeen did not appear in the Court below to show cause; and two now have appar-

ently abandoned any previously asserted claim (R. 135-136). Therefore, the vast majority of Mississippi's direct industrial purchasers of gas for consumption have recognized the fairness of the payment to Mississippi. The remaining claimants clearly are seeking a windfall for themselves.

Argument.

The common complaint of the petitioners in this case and in the petitions for certiorari in Nos. 357 and 360 of October Term, 1950 is that the Court below did not obey the prior mandate of this Court (in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577), and that the questions presented are of importance in the administration of the Natural Gas Act.

Petitioners are wrong on both counts. Their complete misinterpretation of this Court's opinion and the order of the Court of Appeals is due to a lack of understanding of the legal status of Mississippi as a seller of natural gas to industrial customers for consumption. Sales of gas to petitioners by Mississippi are not made under Federal law but under State law (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507). The rights and obligations existing between Mississippi and petitioners are found in the local law of Illinois and not in the Natural Gas Act. Mississippi, in fact, occupies a dual status in its sales of gas. It is a natural-gas company subject to Federal law in respect of its sales to utility distributing companies for resale. It is a seller of gas under state law in respect of its sales to petitioners for consumption.

Once this dual status of Mississippi is understood the legal and equitable principles which the Court of Appeals followed clearly are in accordance with the mandate of this

Court. Those matters to be determined solely with reference to Federal law concern only the sales made by Mississippi for resale. All questions effecting the claims of petitioners must be decided by the local law and those are the only questions involved in this petition.

I.

The decision below is clearly correct and in accordance with the directions of this Court.

Petitioners start off with the contention that the present Order of the Court below is not different from the prior Order which this Court reviewed and set aside. This contention is palpably false. The essence of the previous review and reversal was that the Court below could not summarily award the total amount of impounded funds to the immediate purchasers of Interstate since such purchasers were natural-gas companies and the Court had the duty to look into the relative equities of the parties in the fund involved. This Court did not say that Mississippi could not share in the refund as petitioners claim. Rather the Court below was enjoined to investigate the equities and the local state law to determine to whom payment should be made.[1]

---

[1] "The problem is somewhat more complicated if distribution of the fund is to be made to claimants other than the pipe-line companies. The latter sell gas to at least two types of customers—industrial users over whose rates the Federal Power Commission has no jurisdiction and over which state regulatory bodies may or may not, depending on local law; and numerous distributing companies selling to customers in eight states. If the pipe-line companies had passed the rate reductions on to the distributing companies, those reductions may or may not have reached the ultimate consumers. We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.

"If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it" (336 U. S. at 583).

This is exactly what the Court has done in the matter which petitioners now seek to bring here for further review. The Opinion of the Court below (R. 131 *et seq.*) is devoted almost in its entirety to a weighing of all of the facts and circumstances surrounding the relative equities of the parties. Because of the plan submitted by Mississippi with the concurrence of the Federal Power Commission (R. 11, 13-14) and the concessions made by Mississippi in awarding all excess amounts paid for gas which was sold by Mississippi for resale (R. 11-20, 143), and the cooperation of two of the three state commissions involved (R. 20-24), the Court had removed from its consideration all questions relating to sales of gas by Mississippi for resale. By the same token there was removed from consideration of the Court all questions involving the policy of the Natural Gas Act since such policy is concerned only with sales of gas for resale. This Court's previous opinion in this general refund matter put the matter on its functional basis when it stated:

> "The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility" (336 U. S. at 582).

Therefore, the Court was speaking of, *inter alia,* Mississippi in its function as a wholesaler or as the seller of natural gas for resale. The policy of the Natural Gas Act has been executed in this proceeding, a fact of which the Court below was aware even though petitioners do not seem to comprehend it. Consequently, the burden of the Court below was considerably lightened, but that does not mean that it did not forge ahead and weigh every pertinent fact and principle applicable to a possible distribution of any part of the fund to Mississippi's retail consumers.

Petitioners can strain their rationale to fit some superficial semblance of claim to being wronged by the decision below only by identifying themselves with the wholesale function of Mississippi under Federal law. In effect, they are willing to become utility distribution companies for the immediate purposes of their petition, but one cannot overlook the opening sentence of petitioners' statement (petition, p. 2) wherein it is stated that they are all manufacturers and "purchase natural gas for consumption directly from respondent Mississippi River Fuel Corporation". Having thus found a new status for themselves since making this opening sentence to their Statement, they now identify themselves with all which this Court has stated before in relation to the rights of either Mississippi's utility purchasers for resale or their ultimate consumers. From this point petitioners find it easy to assert that Mississippi in 1943 exacted unreasonable rates from them and, therefore, that Mississippi is in no position to show that its rates were unreasonably low during the impoundment period.[2] This Court in requiring as a condition to obtaining any portion of an impounded fund, a showing by an intermediate natural gas company that its rates were unreasonably low referred only to the wholesale or sales for resale function which is the subject of Federal law. No matter how appealing the language previously used by this Court may be to petition-

[2] True, the Federal Power Commission in 1945 entered a rate reduction order against Mississippi effective January 20, 1946. In said rate reduction order the year 1943 was used as a test year so far as sales volumes and gross revenues alone were concerned. The Power Commission, however, adjusted actual expenses downward and used future expectations in business. The result so far as 1943 is concerned is nothing but an adaptation of an actual year's operations to an anticipated future year after elimination of nonrecurring expense items etc. The Power Commission did not make any conclusions as to the actual 1943 rate situation and its conclusions as to the return of Mississippi were expressly stated to be related only to "regulated sales to the utility customers" (4 F. P. C. 340, 346-351, 360).

ers, the fact remains that it was not said of sales to them, but rather only of sales to the utility distribution companies to which Mississippi sold gas for resale.

We submit to the Court that the direct industrial user, petitioners, cannot identify themselves with ultimate consumers of gas sold by Mississippi for resale by the mere verbiage of their petition.

Petitioners assert that the Court below not only ignored this Court's direction to look beyond Mississippi, but it applied principles just short of holding that Mississippi had an absolute right to the fund and also that "prima facie" the monies belonged to Mississippi. In the first place, the Court of Appeals did look beyond Mississippi but saw nothing there. All it could see was the Order of the Illinois Commerce Commission holding that it had no jurisdiction over the direct sales of Mississippi for consumption (R. 28-36, 139-140) and a similar Order of the Public Service Commission of Missouri (R. 26-28, 139). Also, looking in the direction of the contracts, it could not find in the same any provision indicating a right to a refund from Mississippi to these direct users of gas in the event the commodity was made available to Mississippi at a lower price. In fact the lack of contractual provision in this regard was admitted (R. 133-134). In this regard the Court below said:

> "Valid when made, and remaining valid and binding throughout, unaffected by the Federal rate proceedings and the rate order made by a commission, neither asserting nor having jurisdiction over prices paid or to be paid by them under the contract, they were the fruit of private and arms length negotiations under the compelling pressures of other competing fuels" (R. 138).

Having thus looked for a contractual provision and for a state regulatory process applicable to the situation and find-

ing neither, the Court went on to determine the equities as they stood in view of this lack of applicable state law or contractual provision.

It was in pursuance of this design that the Court noted the fact that the industrial claimants were in no better position from an equitable standpoint because the prices charged, it found, are fixed on a competitive open market basis and there was no ground for finding that Mississippi was unjustly enriched. As the Court below stated:

> "This is so because Mississippi collected from them only what, dealing at arms-length and in a market where prices are fixed by costs of competing fuels, they had voluntarily agreed to pay" (R. 138-139).

The Court below also pointed out that no theory of unjust enrichment can be applicable upon the prayer of these petitioners because by returning to the petitioners a part of the contract consideration the petitioners in turn would be unjustly enriched and so on *ad infinitum* (R. 138-139).

Even if the Court did conclude that, prima facie, the money belonged to Mississippi, the case still proceeded on the basis of a showing by Mississippi that it was entitled to the funds in dispute. Mississippi asserted in its pleading in the Court below that the States of Illinois and Missouri had definitively determined that their regulatory agencies do not have jurisdiction over the sales by Mississippi for consumption. There was no countervailing contention made in respect of the State of Missouri and the State of Illinois was permitted to show, and the Court recognized, that it had recently issued a Citation which would again inquire into Mississippi's status in Illinois (R. 139). Mississippi asserted the lack of any contractual provision entitling the petitioners to a refund on account of the decreased price of the commodity to Mississippi which it, in turn, sold to petitioners for consumption. Inquiry was made of peti-

tioners at the Bar and they conceded the lack of such contractual provision. Regardless of whether the Court determined that Mississippi was *prima facie* entitled to the fund, we submit that it is obvious that having a contract for the sale of the commodity at a set price resulting from arms-length bargaining, any equitable interest which petitioners had would have to be positively shown at the hearing. Mississippi certainly carried its burden of showing its equities in the premises when it was demonstrated that had no Stay Order ever been issued in this case it would have been entitled to keep all excess charges paid to Interstate for gas which Mississippi then sold directly for consumption.[3] So, whatever the Court below may have stated,

---

[3] The total excess charges paid by Mississippi amounted to $1,484,582.53 (R. 91). Of this the following division can be made:

	Applicable to Regulable Sales	Applicable to Direct Sales	Total
June 1, 1943 to January 20, 1946	$300,898.66	$575,281.75	$ 876,180.41
January 21, 1946 to September 30, 1947	244,103.70	364,298.42	608,402.12
Total	$545,002.36	$939,580.17	$1,484,582.53

(R. 92). The Federal Power Commission entered a rate order against Mississippi effective January 20, 1946. Mississippi already passed on at the time this refund controversy arose the amount of $244,103.70 or the amount attributed to excess charges during that portion of the impoundment period in which Mississippi was subject to the Commission's rate reduction order. The amount of $300,898.66 was that amount in excess charges on the quantities of gas sold for resale prior to such rate order against Mississippi (R. 12-14, 92-93). Had no stay been entered in the case of Interstate, Mississippi would have been allowed to keep this $300,898.66 since the Federal Power Commission has no authority to award reparations (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 618). Mississippi agreed however to pass this amount on for the benefit of ultimate resale consumers. The total amount applicable to direct sales for consumption ($939,580.17) is an amount which Mississippi actually lost since it had to pay to Interstate the excess charges for the volume of gas which it sold for direct industrial consumption whereas had the stay not been granted it would have been able to purchase gas from Interstate at the reduced rates but could continue to sell for direct industrial usage at the contract rates (R. 13-14).

Mississippi assumed the burden of going forward with the evidence and placed the matter in such a situation that any countervailing equities would have had to have been shown positively. Even at this late date petitioners are unable to assert one single equitable fact entitling them to any share in the excess charges. All of their contentions upon examination collapse completely. Petitioners plaintively speak of the rules laid down by the Court below which they assert "made it practically impossible for it to find for anyone but Mississippi". An examination of the record in this case shows that it was not any rule laid down by the Court, but the evidence and applicable principles which made it impossible for the Court below to find for anyone but Mississippi. The Court laid down no rules. It afforded of petitioners the widest latitude of making contentions and adducing evidence. As the Court pointed out:

> "all parties were advised that they would be at liberty to file amendments at any time before the filing date set for their briefs if they were, or became, advised that their present pleadings did not suffice."

And also:

> "At the same time and in the same way inquiry was made as to whether there were any controverted issues of fact, particularly as to whether there was any dispute with reference to the amounts • • • whether any of the contracts contained provisions for price relief or reduction • • •
>
> "the parties were advised that if before the coming in of the briefs they should be of a different opinion and should desire to file affidavits or agreed statements as to facts, they could do so" (R. 133-134).

In the face of this, what rules were laid down by the Court of Appeals which prejudiced anyone in a full showing of

any facts or principles? In fact this was not a trial at *Nisi Prius* where there were great and controverted issues of fact. The proceeding largely revolved around questions of law or conclusions to be drawn from undisputed underlying facts (R. 134). In such an instance, an asserted *"prima facie"* right certainly does not mean a presumptive right or an absolute right. The Court merely was of the opinion that the monies presently in dispute being beyond the pale of the Federal regulatory process belonged to Mississippi "unless superior claims to it in law or in equity are shown" (R. 136). Since no right in law or no right in equity was shown or can be shown by these petitioners, the use of the words *"prima facie"* is of no moment.

Petitioners then concerned themselves with the language of this Court in treating of the general refund matter before it in respect of whether reductions would reach industrial users "either by terms of the contracts or by virtue of the assertion of regulatory authority" (336 U. S. at 583). Petitioners have their greatest problem at this point. They assert that regardless of the state of the Illinois law, this Court had determined that Mississippi could not share in any of the excess charges. This certainly was not the conclusion of this Court. This Court was dealing with the second part of its Opinion at this point and was there concerning itself with what ultimately would happen to the refund and was directing its attention specifically to the sphere of sales not covered by the Natural Gas Act but where the states may act. Immediately after the statement of this Court as to what would happen in the case of industrial users, it is stated:

> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the Federal courts should apply it" (336 U. S. at 583).

In conformity with the subsequent portion of this Court's Opinion, the Court relied upon available sources of local law and in strict conformity with the final admonition of this Court it prognosticated what would have happened had no Stay ever been granted, by a proper excursion into all applicable law. The Court below was able to determine with far greater certainty than this Court could have expected exactly what would have happened in regard to the excess charges for gas sold by Mississippi for consumption. Armed as it was with definitive pronouncements of the regulatory agencies of the only two states involved, the Court was able to determine that during the whole of the impoundment period beyond peradventure of doubt no industrial customer could have claimed of Mississippi any reparative or other relief and being without contractual right to do so the benefits of a decreased cost for a commodity inured to the benefit of Mississippi the same as to any other seller in a free market (R. 139-140).

Petitioners confound their confusion by stating that if they as direct industrial purchasers of gas are not entitled to the protection of the Natural Gas Act, the same would be true of sales to industrial customers by local distributors. This, of course, in view of the determination of this Court in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana* (332 U. S. 507) is ridiculous. The authority of the Power Commission over natural-gas companies is extensive but its authority over sales of natural gas by such companies is limited.

Again, pursuing their phantom equitable doctrines, petitioners make the same mistake made by the Illinois Commerce Commission, petitioner in No. 360 of this Term, when they assert as a fact that the payment of excess charges to Mississippi will keep them within a family—

asserting corporate affiliation between Interstate and Mississippi. One could almost accuse petitioners of purposeful misrepresentation in making this assertion because they know for a fact that such affiliation no longer exists.

Further pursuing the equitable aspects, petitioners attempt to maneuver Mississippi out of its rightful lot by alleging that the Court ignored the fact that Mississippi has a monopoly in the St. Louis area. It indicates that this would militate against a finding of arms-length bargaining found to be a fact by the Court below. As indicated by the Court below, Mississippi so far as its industrial sales for consumption are concerned sells gas in competition with other fuels (R. 138).[4]

Indicative of the false foundation upon which petitioners have built their whole assertion of equitable right to any part of the fund is indicated when it states that it has a greater right to the excess charges of gas used for consumption than Mississippi because Mississippi being a regulated monopoly company has a lesser equity than they. They conclude:

> "certainly no such consideration has prevented refunds to business customers of distributing utilities" (petition, p. 14).

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[4] There can be no doubt as to the correctness of this conclusion of the Court below. The Federal Power Commission has impliedly recognized it with particular reference to Mississippi (*In Re Mississippi River Fuel Corporation*, 5 F. P. C. 206, 213). The general competitive nature of natural gas with other available fuels for industrial purposes has also been authoritatively recognized (see Report of Federal Power Commissioners Smith and Wimberly to the Congress, "Natural Gas Investigation" (Docket No. G-580), pp. 336-337, 339, 340-341, 344). The Illinois Commerce Commission has also found that this competitive situation exists (see *Re Peoples Gas Light and Coke Company*, Case No. 37859, August 16, 1950, 85 PUR NS 33, 42), and stated: "Therefore, the rates for these classes of service [referring to industrials] should not be higher than the comparative costs of alternative fuels."

The facts of this case are that no industrial or business customer of any distributing utility purchaser of Mississippi in Illinois will get one cent of the excess charges of gas sold for resale. All distribution under the Decree of the Court is to be made to distributing companies and by them passed on only to their domestic consumers (R. 144-145).

Petitioners claim that the Court below failed to give effect to Illinois law. Essentially, petitioners complain that the Court below should have attended more to an as yet undetermined show cause order premised solely upon unilateral investigation and not seasonable here than to a definitive order of a year before holding Mississippi was not subject to the Illinois Public Utility Law. In the alternative, petitioners claim the Court below should have made its own investigation of and conclusion as to the Illinois law. We submit that the Court below made the logical choice, i.e., choosing a definitive order applicable to the period material here, over a mere initial pleading showing no new facts. The definitive seasonable order of the expert Illinois Commission based upon thorough consideration of probed facts of operation and law is certainly more persuasive than a unilateral attempt at a second guess. Upon this basis the Court below made an actual finding as to the Illinois law when it stated:

> "In these circumstances, it is quite clear that we cannot find that 'clear and speedy state remedies are available' to the industrial customers for the recovery of any of these funds but that the contrary is so. It is equally clear that proceeding 'in the interest of dispatch, to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies', we must determine that these contestants are not entitled under local regulatory law to the refunds they claim" (R. 140).

Nor did this conclusion of the Court as to the state of the law or the availability of remedies to Illinois direct industrial consumers arise solely from the fact of the definitive order finding no jurisdiction. The Court relied also upon the Illinois statute both as to the right to regulate Mississippi's direct consumptive sales and as to any right to reparations on account of these excess charges (R. 139-140, and fn. 10).

In any event, the Statute is not as clear as petitioners would indicate (petition, p. 14) since petitioners omit from the body of their petition the fact that the Illinois law is applicable only to property used for the conveyance of oil and gas by pipe line if for "public use" (Smith-Hurd, Ill. Stats. Ch. 111⅔, §10(a); petition, p. 19). It was the finding of nonpublic use by Mississippi which occasioned the definitive finding of no jurisdiction (R. 34).

In any event, the conclusion of the Court below is peculiarly appropriate in the light of a subsequent order of the Illinois Commission which indicates a willingness upon the part of that regulatory body to allow a public utility to increase industrial rates even in the face of a possible overall excess rate situation (*Re Peoples Gas Light and Coke Company,* 85 PUR NS 337 (Ill. Com. Comn., Case No. 37859, August 16, 1950)). So, even if all petitioners say were true the Court below came to a correct conclusion as to probably what would happen in Illinois so far as the equities of the industrial consumers are concerned even today. Of course, since the Court had to reconstruct the probability had no Stay been granted, the definitive Order of 1949 concluding that there was no jurisdiction in the Illinois Commission would be conclusive of all of petitoners' claims here (R. 28-35). Also, the right to any reparations under the Illinois procedure would be gone

completely (Smith-Hurd, Ill. Stats. Ch. 111⅔, §76, petition, p. 20).

On the merits, therefore, the claim of petitioners that the Court below failed to carry out the mandate of the Court and that it failed to apply equitable principles and the Illinois law are without any foundation whatsoever.

II.

There is no question remaining under the Natural Gas Act or otherwise upon which this Court has not passed.

Petitioners, being direct consumers of gas sold by Mississippi, cannot assert any claims or rights under the Natural Gas Act since that Act's coverage as it relates to sales is limited to "sales for resale". As pointed out previously, no question on such sales is involved here and the confusion injected by petitioners arises solely from an attempt by them to identify themselves with utility distribution companies to which Mississippi sells gas for resale.

All other questions involved have already been passed on by this Court both in the previous appeal on the general refund situation (336 U. S. 577) which is the law of the case and also in *Central States Electric Company* v. *City of Muscatine, et al.* (324 U. S. 138), as construed by this Court under the law of this case. The Court below, being concerned only with the rights of direct consumers of gas sold by Mississippi, had the simple problem of determining their rights under local law as required by this Court. This the Court below did. There is no question remaining requiring a further review by this Court. Stripped to the bare essentials, this case involves only the question of the

rights which petitioners had under the law of the case and since such law has been strictly and fairly applied, no further question remains.

Conclusion.

For the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 357

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS CO., OLIN INDUSTRIES, INC., and SCULLIN STEEL CO.,
Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION and INTERSTATE NATURAL GAS COMPANY, and the ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS CO., OLIN INDUSTRIES, INC., and SCULLIN STEEL CO.,
Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION and INTERSTATE NATURAL GAS COMPANY, and the ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, entered on July 15, 1950, in the case there entitled "**Interstate Natural Gas Company v. Federal Power Commission et al.**" No. 10701 on the docket of said Court.

OPINIONS BELOW.

The opinion of the Court of Appeals (Record, p. 131) is reported in 181 F. (2d) 833.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 15, 1950 (Record, p. 141). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTE INVOLVED.

The Natural Gas Act, June 21, 1938, c. 556, § 24, 52 Stat. 833, 15 U. S. C. §§ 717-717w.

QUESTION PRESENTED.

Are ultimate consumers of natural gas who purchased directly from an interstate pipe-line company at rates which were not then regulated by any state agency entitled to share in a fund impounded by the Court of Appeals while review was had of a Federal Power Commission order reducing the rate for natural gas charged to the pipe-line company by its supplier, or should the portion of the fund created by the purchases of such consumers be awarded to the pipe-line company which had in no way passed on to them the benefit of the reduced rate?

STATEMENT.

The question raised here stems from a previous decision by this Court in this cause in which it reversed an order of the Court of Appeals for the Fifth Circuit awarding the impounded funds to the pipe-line companies. **Federal Power Commission v. Interstate Natural Gas Co.**, 336 U. S. 577, 93 L. ed. 895, 69 Sup. Ct. 775 (1948). Although this was the second review of the case by this Court, the present petitioners did not previously appear in the matter. It was only as a result of this second opinion that they were brought into the proceedings.

Prior History of the Case.

The initial litigation arose as a result of an order of the Federal Power Commission which asserted jurisdiction under the Natural Gas Act over the rates charged for natural gas by Interstate Natural Gas Company (hereinafter called "Interstate"), a producer, purchaser and gatherer of natural gas operating intrastate in Louisiana. Interstate sold natural gas to various interstate pipe-line companies, including the Mississippi River Fuel Corporation (hereinafter called "Mississippi"). The Federal Power Commission determined that the rates charged by Interstate were excessive and ordered a reduction therein. Reviews of this order were made by the Court of Appeals for the Fifth Circuit and by this Court. The fund under consideration was impounded during the pendency of that litigation, the reduction order being stayed and Interstate being required to pay into the registry of the Court of Appeals the amount by which its rate exceeded the rate fixed by the Commission. It was finally determined that the Federal Power Commission had jurisdiction to fix the rates of Interstate and the order of the Commission reducing the rates was sustained. 331 U. S. 682, 91 L. ed.

1742, 67 Sup. Ct. 1482. At the conclusion of this phase of the litigation, the problem first arose as to whom this fund should go. The pipe-line companies which were Interstate's customers claimed the fund. Certain state and municipal agencies also intervened, claiming the fund for the ultimate consumers of natural gas. The Court of Appeals ruled that the fund should be returned to those from whom the excessive payments had been exacted, i. e., the pipe-line companies, among them Mississippi. 166 F. (2d) 796.

By petitions for certiorari the Federal Power Commission and the state and local regulatory bodies brought this ruling before this Court, which reversed the decision of the Court of Appeals, and remanding the case, directed that it distribute the impounded fund in accordance with the opinion of this Court. This Court instructed the Court of Appeals to look beyond the pipe-line companies and place the funds in the hands of the ultimate consumers who were the intended beneficiaries of the Natural Gas Act.

Thereafter Mississippi, in co-operation with the Federal Power Commission and the regulatory agencies of those states wherein it had sold gas, attempted to work out an arrangement for the distribution of that part of the impounded fund attributable to payments made by Mississippi to Interstate (Record, p. 2). This segment of the fund amounted to $1,484,582.53 (Record, p. 13). The arrangement settled upon allowed payment of a ratable portion of this segment of the fund to the local distributors of natural gas who had purchased from Mississippi for resale, the distributors in turn to pass these funds along to their customers, the ultimate consumers of gas. The sum to be passed on to consumers was only $545,002.36, considerably less than half of the excess payments made by Mississippi. But Mississippi River Fuel Corporation

still took the position that it was entitled to receive that portion of its segment of the impounded fund which represented payments made by it for natural gas sold to industrial consumers who purchased their gas directly from Mississippi. Thus, Mississippi would receive the considerable sum of $939,580.17 (Record, p. 13). Mississippi recognized that its claim to these moneys was not beyond question and attempted to obtain disclaimers from the industries which were its consuming customers during the impoundment period (Record, p. 24). These industrial consumers of natural gas had not previously known of the existence of the fund. Some of them signed disclaimers; a number refused to do so. Mississippi also encountered further difficulty in that the Illinois Commerce Commission refused to assent to the plan. When Mississippi reached this impasse it embodied its plan in a proposed decree and submitted this to the Court of Appeals, praying that an order issue to show cause why that portion of the funds collected from Mississippi should not be so distributed.

Entry of Petitioners Into the Cause.

An order to show cause was accordingly issued March 2, 1950, returnable March 17, 1950 (Record, p. 40). This order was directed to all of the consumer customers of Mississippi and was sent to them by mail. It was at this point that petitioners were first brought into the litigation.

The petition of Mississippi seeking the fund (Record, pp. 1-35) stated that it was a natural gas company within the meaning of the Natural Gas Act, that it purchased natural gas from Interstate, which it transported in interstate commerce and sold to local utility companies for resale and to industrial customers in the States of Missouri and Illinois for direct consumption. It averred that in Missouri and Illinois there is no state regulation of its direct sales of natural gas to consumers (Record, p. 3).

It also set out the exact amounts of the impounded fund allocable to its various consuming customers (Record, pp. 5-7 and 9-11). Petitioners' contributions to this fund, as stated by Mississippi, are as follows:

Alton Box Board Company	$34,795.28
Blackmer & Post Pipe Company	4,791.54
Laclede-Christy Clay Products Co.	45,849.53
Olin Industries, Inc.	15,331.48
Scullin Steel Co.	62,398.51

Mississippi made no allegation and offered no proof that it had in any way passed on to its consuming customers the benefit of the rate reduction.

Responses to the petition of Mississippi and the order to show cause were filed by many of the consuming customers opposing the entry of the decree proposed by Mississippi and praying that shares of the fund attributable to gas purchased by them be paid to them (Record, pp. 41-85 and 128 to 130). On the designated day counsel for many of the consuming customers* appeared in the Court of Appeals to assert the claims of such purchasers to a share in the fund.

The Court of Appeals, after determining what parties were represented by counsel, agreed to hear argument of one attorney on behalf of consuming customers in Illinois and one on behalf of consuming customers in Missouri. In addition, in the course of the day's proceedings, the Court heard counsel for the Federal Power Commission, Mississippi, Interstate, the Illinois Commerce Commission and the Missouri Public Service Commission.

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* Alton Box Board Company, Blackmer & Post Pipe Company, General Steel Castings Corporation, Granite City Steel Company, Laclede-Christy Clay Products Company, Laclede Steel Company, Owens-Illinois Glass Company, Scullin Steel Co. and Western Cartridge Company. Several other industrial users filed responses to the order to show cause, but did not appear in court on the return day.

No attorney representing a regulatory commission argued that the claims of Mississippi's consuming customers were unfounded. The representative of the Federal Power Commission stated that the Federal Power Commission took no position in regard to the matter. The representative of the Missouri Public Service Commission stated that the Missouri Commission had no jurisdiction over direct sales by pipe lines to consumers. The representatives of the Illinois Commerce Commission urged that Mississippi's consuming customers be allowed to share in the distribution of the fund.

After allowing time for the filing and consideration of briefs, the Court of Appeals handed down its opinion on May 9, 1950 (Record, p. 131), in which it upheld the position of Mississippi and expressed its intention to enter the decree submitted by Mississippi in its petition, with an addition thereto providing for the distribution by the Illinois utility companies to their customers of the sums which were to be paid to them.

A decree was accordingly prepared and was finally entered by the Court of Appeals on July 15, 1950 (Record, p. 141). It is this decree which petitioners now pray this Court to review.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals has erred in its interpretation of the opinion of the Supreme Court in that:

1. It has ruled that Mississippi River Fuel Corporation, an interstate pipe-line company, may receive that portion of the impounded fund which resulted from direct payments for natural gas made to it by ultimate consumers, whereas the Supreme Court directed that the Court of Appeals look beyond the pipe-line companies for the rightful claimants of the fund.

2. It has ruled that the legal rights and the equities of these consumer-customers to a share in the impounded fund are inferior to those of the interstate pipe-line carriers from whom they purchased natural gas.

STATEMENT OF REASONS RELIED UPON FOR ALLOWANCES OF WRIT.

1. The decision of the Court of Appeals involves new and significant issues:

(a) The question presented to the Court was an important one as to the meaning of the Natural Gas Act and the authority of the Federal Power Commission.

(b) In determining this matter, the Court passed upon the claims of a class of natural gas consumers which had not previously appeared in cases of this sort. Petitioners here are members of this new class of claimants.

2. The issues which were before the Court of Appeals are likely to be presented to the Courts again, as the Federal Power Commission will doubtless regulate the rates of many producers of natural gas who sell to interstate pipe-line companies, now that it has adequate precedent to rely upon in so doing. When such orders are reviewed by the Courts of Appeal, funds like the one here in question will be again created and consumers of natural gas, who, like these petitioners, purchased directly from pipelines, will again seek to share in them. It is thus essential that the Courts and the Commission be guided by the Supreme Court as to the rights of such claimants and the proper distribution of such funds.

3. The opinion and decree of the Court of Appeals is in conflict with the opinion and mandate in which this Court instructed the Court of Appeals as to the disposition of the fund in question. This is due to a complete disregard and misinterpretation of what was said by this Court. If the opinion of this Court is allowed to stand erroneously interpreted by the Court of Appeals for the Fifth Circuit, only confusion can result as to what is actually the law of this subject.

ARGUMENT.

I.

The Courts of Appeal not infrequently impound excess rates pending their review of rate reduction orders made by the Federal Power Commission pursuant to its authority under the Natural Gas Act, 15 U. S. C., Sections 717 et seq. However, the instant case happens to be the only one of which petitioners are aware in which moneys were impounded which derived from payments made by consumers who purchased natural gas directly from a pipe-line carrier and whose rates were not state regulated. Hence the case is in that respect unusual and presents a new and heretofore unresolved question of law of considerable national importance.

It is a question likely to arise again as the veto by the President of the United States of the "Kerr Bill," H. R. 1758, a bill to amend the Natural Gas Act, leaves established the law as announced by this Court in its first decision in this case, i. e., the Federal Power Commission will continue to have the power to regulate sales in interstate commerce by producers and gatherers of natural gas. In view of the rapid expansion of the natural gas market and the rising prices which result from increased demand, the Federal Power Commission will doubtless in the future find it more and more necessary to fix the rates charged by producers to pipe lines,[1] and such regulation is almost sure to result in future litigation involving the same problems which the instant petition presents.[2]

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1 See President's Message Vetoing Natural Gas Amendment, April 15, 1950, H. R. Doc. No. 555, 81st Cong., 20 Sess.

2 Several cases examining closely related problems have already reached appellate courts since the opinion of the Supreme Court in Federal Power Commission v. Interstate Natural Gas Co., 336 U. S. 577, 93 L. ed. 895, 60 Sup. Ct. 775 (1948). See Cities Service Gas Co. v. Federal Power Commission, 176 F. (2d) 548 (C. C. A. 10th, 1949); Straube v. Bowling Green Gas Co., 227 S. W. (2d) 669 (Mo. Sup., 1950).

Thus, although the problem presently comes up in connection with the distribution of a fund at the end of prolonged litigation and at first glance might seem to be a matter of little consequence, it is closely bound to the larger problems of the intended scope of the Natural Gas Act and the power and jurisdiction of the Federal Power Commission.

When the Federal Power Commission undertook to regulate the rates charged by Interstate to various pipe-line companies, it must be assumed that it did so in the interest of the ultimate consumers of natural gas, for consumers are the intended beneficiaries of its activity and it has no authority to act except in their interest.

Federal Power Commission v. Interstate Natural Gas Co., 336 U. S. 577, 93 L. ed. 895, 69 Sup. Ct. 775 (1948);

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944).

The Federal Power Commission could not have intended to benefit the pipe-line companies. It has no authority to prefer them over producers. The Natural Gas Act was primarily directed against interstate pipe-line companies, as they were beyond the power of the individual states. Control of these particular companies for the benefit of others was the major object of Congress in passing the Act.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944)[3];

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[3] "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation . . . state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. Moreover, the investigations of the Federal Trade Commission had dis-

Mississippi River Fuel Corp. v. Federal Power Commission, 121 F. (2d) 159 (C. C. A. 8th, 1941);
Cities Service Gas Co. v. Federal Power Commission, 176 F. (2d) 548 (C. C. A. 10th, 1949).

An examination of the legislative history of the Natural Gas Act reveals nothing which indicates that Congress meant to exclude industrial consumers from the protection of the Act or in any way to distinguish them from other ultimate consumers. The Congress was in fact interested in seeing to it that industries be enabled to obtain natural gas.[4] Industrial consumers purchasing gas from local public utilities are, of course, specifically protected by the Act.[5]

It is not and has never been the national policy to discriminate against industrial consumers of natural gas or to restrict in any way their use of gas. Such restriction is deemed advisable by advocates of the conservation of natural resources, but this Court has ruled that there was no Congressional intent to regulate industrial use when the Natural Gas Act was passed. The status of industrial users is, therefore, the same as that of any other ultimate consumers.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944).

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closed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils." **Federal Power Commission v. Hope Natural Gas Co.,** 320 U. S. 591, 610, 88 L. ed. 333, 349.

4 See the statement printed in the Congressional Record by Senator Burton K. Wheeler, 83 Cong. Rec., pp. 2422-2424 (1938), and especially the following quotation: "Many communities are crying for natural gas for needed industrial power and fuel . . ."

5 "(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, . . ." 15 U. S. C., § 717b.

Since the Federal Power Commission reduced the rates of Interstate for the benefit of ultimate consumers of natural gas, it necessarily follows that the impoundment, suggested and approved by the Commission, of all of the money resulting from sales to Mississippi implemented the purposes of the Natural Gas Act and was for the benefit of all ultimate consumers who obtained natural gas from Mississippi, direct consumers as well as utility purchasers for resale.

This should have been in the minds of the members of the Court of Appeals in ruling upon the distribution of the impounded fund. In a proceeding such as this for the distribution of the funds it is true that it cannot be determined just how or how much various ultimate consumers would have benefited had it not been for the act of the Court in staying the rate order. The distribution of the fund necessarily had to be based upon a somewhat arbitrary determination as to what would probably have happened. However, the Court of Appeals completely ignored the purpose of the Federal Power Commission in regulating rates and the reason for its own impoundment order in deciding that industrial consumers of gas would have received no benefit whatsoever from the Power Commission's rate reduction and that a pipe-line company, which was not intended to benefit at all, would have succeeded in benefiting itself to the extent of pocketing all of that portion of the excess rate which it paid for gas sold to industries.

The effect of this holding is to suggest that the Federal Power Commission might legally regulate the rates of natural gas in such a way as to increase the profits of pipeline companies. This is a startling departure from what was previously considered to be the law, i. e., that the Federal Power Commission was to regulate pipe-line and

other natural gas companies for the benefit of ultimate consumers.[6]

Furthermore, if a regulated natural gas company is to be the recipient of such funds, there is no reason for impounding them in the first place, as the impoundment results only in an unwarranted preference of one natural gas company over another.

Of course, had these funds representing natural gas sold directly to industrial consumers not been impounded, Interstate would have continued to receive the higher rate on that portion of gas during the litigation and the moneys now in controversy here would have been in its coffers, although the rate charged by Interstate was determined by the Commission and the Courts to be excessive.

But there is no reason why this result is any more absurd, illegal or unjust than the result reached by the Court of Appeals in handing these funds to the pipe lines. Interstate surely has as much claim as Mississippi to enjoy profits resulting from the flow of natural gas to industrial purchasers, and it would have seemed inconceivable prior to this litigation that the Federal Power Commission should have authority to act in such a way as greatly to prefer one natural gas company to another!

It was against such a possible result that Senator Kerr directed his efforts as he urged the passage of the bill referred to, supra, page 10, which was intended to alter the law as defined by this Court in the initial opinion in this case. During the course of the Congressional debate after Senator Douglas had stated that he hoped Congress would defeat the Kerr amendment and thus continue the authority of the Commission to regulate independent producers, Senator Kerr exclaimed:

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6 The Natural Gas Act actually denies the Federal Power Commission the power to order increases in the rates of natural gas companies. 15 U. S. C., § 717d (a).

". . . I should like to ask the Senator from Illinois if he is aware of the fact that the interstate transporters sell about one-sixth of all the gas they transport to industrial consumers; that such sale is not regulated by the Commission, and that there is no control on the interstate carriers of the profits they may make in the sale of that part of the gas which they sell; and that the suggestion he has made would result in the amazing situation of the independent producer being entirely regulated as to what price he could receive, and the pipe-line company itself, which was created as a monopoly, would be unregulated in the amount of profit it could make on the part that it now sells direct to industrial consumers or which it may choose to sell in that market in the future?" 96 Cong. Rec., March 16, 1950, p. 3501.

It is apparent that Senator Kerr and the Congress, which passed the amending bill, did not desire this "amazing situation" to result from their legislative efforts.

Petitioners feel that it is equally clear that this Court did not intend this to result from its opinions in this case. However, the Federal Power Commission has been uncertain as to the meaning and effect of these opinions and the members of Congress were admittedly confused in March, 1950.[7] The Court of Appeals for the Fifth Circuit has now

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[7] Senator Johnson (of Colorado): "The committee feels that it is necessary now to adopt an amendment to the Natural Gas Act of 1938 in order to eliminate the confusion which exists in the Federal Power Commission and in the natural-gas industry with respect to the interpretation of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder, following the Supreme Court decision in the so-called **Interstate Natural Gas Co. case** (331 U. S., p. 682)." 96 Cong. Rec., March 16, 1950, p. 3497.

Senator Kerr: ". . . the situation is about as confused as it can be." 96 Cong. Rec., March 17, 1950, p. 4147.

Senator Johnson (of Texas): "Why are we considering this legislation? What makes it necessary for the Senate to debate the question now before us? The answer is this: The Federal Power Commission, the agent of Congress, is unable to determine what the law of the land says with regard to Federal jurisdiction over independent producers and gatherers of natural gas." 96 Cong. Rec., March 20, 1950, p. 4351.

added to the confusion with its latest decision in this case awarding to a pipe-line company the benefits of a rate reduction order.

As the Congress by Presidential veto was prevented from clarifying the situation and from making the law conform to its wishes, it has become highly important for this Court to say whether or not the law as announced by it may be interpreted in such a way as to bring windfalls to pipe-line companies, the very companies against which Congress directed its efforts in enacting the Natural Gas Act.

Petitioners respectfully submit that the Court of Appeals for the Fifth Circuit has committed serious error in its interpretation of this important federal statute and in its view of the purpose and effect of the regulatory activities of the Federal Power Commission, an important federal agency. The regulation of sales of natural gas in interstate commerce being a matter of general national concern, and problems of the type arising in the instant case being likely to recur frequently before the Courts of Appeals in future rate-review proceedings, the question presented in this petition merits further consideration by this Court.

II.

The consideration of the problem by this Court is made even more important by the existence of a conflict between its previous opinion upon this subject and the opinion of the Court of Appeals which purports to follow the opinion and mandate of this Court.

The situation which presently obtains leaves the law in complete confusion. The Court of Appeals has disregarded and misinterpreted the opinion of the Supreme Court and has set out its misinterpretations in its own

opinion, with the result that those who may subsequently seek guidance upon the law of this subject will be unable to determine what it is.

When the problem of distribution of the impounded fund first arose in the Court of Appeals, that Court awarded all of the fund to the pipe-line companies. On certiorari to this Court, the order of the Court of Appeals was reversed and this Court directed the Court of Appeals to look beyond the pipe-line companies for the rightful claimants to the impounded fund. Despite this very specific direction, the Court of Appeals has once again ordered that a large portion of the fund be paid to a pipe-line company.

This Court opened its previous opinion by stating that the pipe-line companies could not have this fund unless it was clear as a matter of federal law that they were entitled to it. Upon an examination of the federal law, this Court found no basis for the pipe-line company's claim. But the Court of Appeals has again ruled otherwise.

The Supreme Court in its opinion said the basis of the claim stated in the petitions of the pipe-line companies for intervention was "that they are entitled to the fund as of right, since it was created by their payments" and then this Court held that "we would be unmindful of the purpose of the Act [Natural Gas Act] and the responsibility of the federal courts under it, if we so ruled."

The Court of Appeals, totally disregarding this portion of the Supreme Court's opinion, states in its opinion as follows: ". . . We think it quite plain that, at least, prima facie, these moneys are the property of Mississippi and must be distributed to it, unless superior claims to it, in law or in equity, are shown."

Petitioners respectfully submit that this portion of the opinion of the Court of Appeals is in direct and irreconcilable conflict with the opinion of the Supreme Court.

Thus passing over the basic holdings of the Supreme Court, the Court of Appeals goes on to state that a "careful reading" of the opinions of the members of the Supreme Court leave it without doubt that its duty "is to find out in the best way it can and determine what law and equity, in each of the states where the money was collected, demands as to the just distribution of the excess funds collected, by Interstate from Mississippi."

This is a fair statement of what the Supreme Court did indeed hold to be the duty of the Courts of Appeals, but by the time the Supreme Court had reached this point in its opinion, it had already held (and it is this that the Court of Appeals chooses to disregard) that the pipe-line companies were not to share in the fund and that the Court of Appeals in making such distribution as equitable principles should demand, was **"to look beyond those companies . . ."**

The Court of Appeals, having made its fundamental error in disregarding the principal holding of the Supreme Court, proceeds to compound this error while purportedly following the mandate of the Supreme Court.

First, it finds "no basis in the law of contract for ordering Mississippi to refund to its direct industrial customers any of the money it collected from them pursuant to these contracts. . . ." This statement, of course, results from the Court of Appeals' erroneous premise, i. e., that this fund is prima facie Mississippi's and that other claimants have the burden of showing why Mississippi should not have it. The Court in its sympathy for the pipe-line companies apparently cannot help regarding the situation as

one in which Mississippi is being called upon "to refund" something.

It goes on in the same way to dismiss summarily any possible equitable claim of the industrial consumers, using in its anxiety to dispose of this problem a reductio ad absurdum which again shows its fixed idea that these moneys are the property of the pipe-line companies:

> ". . . if this court, on the theory of unjust enrichment to Mississippi by returning to it **its own money** [Emphasis added] which it had paid out, were to order these moneys paid over to the Industrial customers, it would then, on the same principle, have to order them in turn to pay them over to the contract consumers of their goods, and so on, ad infinitum."

Having shut its eyes tightly and rushed by the major hazards to its hope of awarding Mississippi this fund, the Court of Appeals hastens on to find that no local regulatory law assists the industrial consumers and approves the plan submitted to it as "just, fair, and reasonable."

Petitioners respectfully submit that the law should not be left in the present state of conflict and confusion and that the gross error of the Court of Appeals should not be allowed to stand.

While the previous opinion of this Court would normally be expected to serve as a guide in further litigation, the opinion of the Court of Appeals is more recent and purports to interpret or apply the opinion of the Supreme Court, which in fact it disregards. In these circumstances, the law remains much in doubt. The question is one which is almost certain to recur and petitioners feel that this Honorable Court should grant this their application for writ of certiorari correcting the error which has been committed and clarifying the law for them and for those who in the future may be involved in similar litigation.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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November 13, 1950.

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The opinion of the United States Court of Appeals for the Fifth Circuit (R. 131) is reported at 181 F. 2d. 833.

Jurisdiction.

The opinion and judgment of the Court of Appeals was filed May 9, 1950 (R. 131). The formal decree adopted in said judgment was entered July 15, 1950 (R. 141). Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C., Section 1254 (1).

Question Presented.

Where a natural-gas company sells gas for resale and also for consumption, may it be awarded overcharges paid by it to a supplying natural-gas company when the amount of such overcharges concededly relates to natural gas purchased for direct sale for industrial consumptive use if no local law or regulatory process inhibits such distribution and the privately negotiated arms length contract of sale to the direct industrial consumer does not provide for a reduction in price?

Statute Involved.

Section 1(b) of the Natural Gas Act (52 Stat. 821 (1938), 15 U. S. C. § 717(b)):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement.

Petitioners' statement is in large measure a correct one. Certain details of it, however, must either be corrected or enlarged upon.

At page 4, petitioners assert that this Court in *Federal Power Commission et al.* v. *Interstate Natural Gas Company et al.*, 336 U. S. 577, instructed the Court below to look beyond Mississippi and place the fund in the hands of ultimate consumers—the intended beneficiaries of the Natural Gas Act. This Court gave no such instruction. In remanding the case to the Court of Appeals for further proceedings, this Court clearly delineated between those sales of Mississippi River Fuel Corporation ("Mississippi") which are controlled by federal law, and those controlled by local law. Whether ultimate consumers would receive any part of the fund was to be judged by local law. This Court left no doubt on that score when it noted that it could not be known whether reductions would reach industrial users either by virtue of their contracts or by virtue of the assertion of local regulatory authority. This Court went on to state:

> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal courts should apply it. If clear and speedy state remedies are available, the federal court might hold the fund until those having the final say on the state law questions have spoken. * * * But in absence of such a showing the federal court in the interest of dispatch should proceed to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies." (*Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. at pp. 583-4)

Therefore, the Court below was correct in considering the dual role occupied by Mississippi, i.e. as a natural-gas com-

pany selling gas for resale and as a direct seller of gas for consumption to industrial consumers, *inter alia*, petitioners.

At page 5, petitioners claim that Mississippi realized the questionable character of its claim since it attempted to obtain disclaimers from industries to which it sold gas directly for consumption. This procedure was no confession of weakness but was an attempt on the part of Mississippi to make the plan which it submitted to the Court below simple and completely effective. This Court had indicated that two factors might operate to place a portion of the fund in the hands of direct industrial consumers of Mississippi (either by contract or by virtue of state regulatory processes). Consequently, the disclaimer method was a direct approach to the problem and aided the Court below in that administrative process which it had to carry out pursuant to the order of this Court (R. 131-132).[1]

Petitioners' claims represent a total of $163,166.34 out of the total of $939,580.17 of excess charges paid by Mississippi for gas sold directly to industrial consumers. The five petitioners in this docket along with the four in the petition in No. 356 represent the total of only nine direct industrial consumers of Mississippi who claim a right in the impounded funds and their total claims amount to $467,618.79. Mississippi sells gas to fifty-five direct industrial consumers, twenty-two of whom recognized that they had no claim; seventeen, did not appear in the Court below and show cause; and two now have apparently abandoned any previously asserted claim (R. 135-136).

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[1] "Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process." (336 U. S. at 584)

Contrary to petitioners' statement (petition, p. 7) the Missouri Public Service Commission signed the stipulation agreeing that petitioners were not entitled to any part of the funds (R. 16, Item 6; 18). Of the petitioners on this petition, Blackmer & Post Pipe Company, Laclede-Christy Clay Products Company and Scullin Steel Company purchased gas from Mississippi in Missouri. The companion petition (No. 356) involves the claims of direct industrial users in the State of Illinois only. Aside from this fact, however, the claims of Mississippi's direct industrial consumers are the same and what Mississippi says in response to the companion petition is applicable here as well.

Argument.

The argument in this petition parallels to some extent that made in the petition at No. 356 of this Term. The petitioners make common cause and common mistake. This petition, however, is such a tedious repetition of error on error as to make an answer on the merits of the case practically impossible. What is required appears to be a succinct elucidation for the benefit of the petitioners of the exact regulatory situation which exists under the Natural Gas Act. It apparently has escaped petitioners entirely that Mississippi occupies two regulatory spheres. The first is with respect to sales which are made to public utility distribution companies for resale, wherein the policy and coverage of the Natural Gas Act is supreme and exclusive. The second is with respect to sales which are made directly for consumptive use to industries such as petitioners and here the state may act in the constitutional sense—the only question being whether the state has enacted local law (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507). With an apprecia-

tion of the dual role occupied by Mississippi, therefore, short shrift can be made of the purported arguments and reasons which petitioners assert for the granting of the writ.

This Court made it clear that the rights of the pipe line companies as natural-gas companies under the Natural Gas Act depend upon federal law. It is this basis of federal law that the Court outlined in these words:

> "Moreover, if the pipe-line companies passed on to their customers the rate reductions from the date of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from those exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund." (336 U. S. at 582)

Whether the utility distributing companies or their consumers should receive the fund depends upon local law (336 U. S. 577, at 583).

At this point, petitioners commit the error of assuming that it is federal law that governs the relationship between them and Mississippi. Petitioners are consumers, purchasing from Mississippi and their rights depend upon the law of Illinois or Missouri. Since petitioners' argument is based upon an erroneous concept of what law applies to their claims, their whole false structure collapses.

The fallacy of petitioners' contention that this Court directed the Court below not to award any portion of the fund to Mississippi is demonstrated in Mississippi's opposition brief in No. 356 and need not again be repeated.

I.

Importance of the Question.

Petitioners start off their argument and reasons for the issuance of the writ by stating that:

> "the instant case happens to be the only one of which petitioners are aware in which moneys were impounded which derived from payments made by consumers who purchased natural gas directly from a pipe-line carrier and whose rates were not state regulated" (petition, p. 10).

Petitioners go on to state that, therefore, there is an unresolved question of law of national import (petition, p. 10). In the opinion in *Federal Power Commission* v. *Interstate Natural Gas Company, Inc.* (336 U. S. 577), this Court certainly dealt with the whole question before it at that time, including the right of direct industrial customers of Mississippi and other pipe lines similarly situated to share in the excess charges which had been impounded. In fact, here there are no problems in this case arising under the Natural Gas Act remaining unresolved. Mississippi initiated a plan of distribution whereby all excess charges paid for gas which Mississippi purchased for sale to utility distribution companies for resale are forever out of Mississippi's hands. The Court approved this plan and the funds are being distributed as prescribed by the appropriate state regulatory agencies in Arkansas and Missouri and to ultimate consumers of such gas sold for resale in Illinois under the decree of the Court (R. 11-24, 144).

The most appalling error occurs in the outright assertion of petitioners that Congress in enacting the Natural Gas Act did not mean to exclude direct industrial consumers from

the protection of the Act, or in any way to distinguish them from ultimate consumers of local utility distributing companies (petition, p. 12). The Natural Gas Act was intended to fill a gap in the regulatory situation and direct sales of gas sold in interstate commerce directly for consumption were not held to be beyond the pale of state processes at the time of the enactment of the Natural Gas Act (see *Pennsylvania Gas Company* v. *Public Service Commission,* 252 U. S. 23). Of course, the true regulatory situation is set forth by this Court in its opinion in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana* (332 U. S. 507), a case not cited by petitioners and obviously either not read or understood by them. An equally erroneous comment is that industrial users purchasing from public utility distribution companies are protected by the Act (petition, pp. 12-13). It is axiomatic that the Natural Gas Act regulates sales only between a pipe line company and a distribution company.

Another erroneous allegation is that, absent impoundment, Interstate would have continued to receive the excess charges (petition, p. 14). Without the stay and impoundment the lower rates would have gone into effect as ordered by the Commission (Natural Gas Act, § 19(c), 52 Stat. 831, 15 U. S. C. 717r(c)). Thus, Mississippi would have paid the lower rate and petitioners would have continued to pay the prices fixed in their contracts. Petitioners then assert that the result reached by the Court below is just as absurd as allowing Interstate to keep the excess charges. Again, petitioners have failed to recognize that all of the sales by Interstate to Mississippi were sales for resale regulated by the Natural Gas Act. Mississippi, however, performing a dual role makes some sales regulable under the Natural Gas Act, but its direct sales for consumptive use are not so regulable.

The reference to the Kerr Bill is without pertinency since that legislative proposal dealt with sales by producers to natural-gas companies. Furthermore, the quotation from Senator Kerr (petition, p. 15) indicates a confusion equal to that of petitioners. Apparently, both Senator Kerr and petitioners have not learned that the Natural Gas Act was not directed against sales by pipe lines directly to industrial consumers (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507), but only against sales to distributing utilities for resale to domestic and other consumers.

II.

The Decision of the Court Below Is Correct.

Making common cause with other petitioners before this Court, petitioners here state that this Court in announcing the law of the case directed the Court below to look beyond the pipe line companies for the rightful claimants to the impounded funds. This direction was made to the Court below only in respect of the Federal law specifically stated by this Court to be the Natural Gas Act and, therefore, applicable only to sales for resale (336 U. S. 577, 580). The Court below did not disregard this portion of this Court's direction. By its decree, it ordered the excess charges paid by Mississippi for gas sold for resale in Arkansas and Missouri to be returned through state regulatory channels to those parties deemed entitled thereto by the Arkansas and Missouri Commissions.

The Illinois Commerce Commission would not join in the plan approved by the Arkansas and Missouri Commissions but the Court with the approval of Mississippi and the Federal Power Commission saw to it that the amounts

attributable to sales for resale in Illinois would reach ultimate domestic users (R. 144).

The previous holding of this Court in the general refund matter squarely covers the situation here. This Court held:

> "If the pipe-line companies had passed the rate reductions on to the distributing companies, those reductions may or may not have reached the ultimate consumers." (336 U. S. at 583)

In this case the funds will reach all Illinois domestic consumers purchasing gas from distribution companies. It also will pass down the line under the orders of the Missouri and Arkansas Commissions (R. 143). This problem, therefore, is not in issue, but has been resolved completely in accordance with this Court's direction.

This Court went on to state (336 U. S. at 583):

> " * * * We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.
>
> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it."

In this case, admittedly under their contracts there is no right in these petitioners to claim a portion of the excess charges (R. 133-134). Local law not only provides no standard for determining that petitioners have a claim superior to Mississippi's under the contracts, but in the states where Mississippi makes all of its direct sales for conumption the state commissions have definitely disclaimed authority over Mississippi's sales for consumption within their borders (R. 26—Missouri; R. 28—Illinois).

Here, the Court has made a careful appraisal of the facts, of the law and of the equities (R. 136-140). It determined that petitioners as against Mississippi have no claim to the fund. The contracts between Mississippi and petitioners were the result of arms length bargaining and set a price unregulable under existing local law and not subject to change on account of a decrease in the cost of the commodity to Mississippi. Mississippi in making these direct industrial consumption contracts was dealing on a competitive basis and not as one having a monopoly in the fuel usable by petitioners (R. 138; Report of Federal Power Commissioners Smith and Wimberly to Congress, "Natural Gas Investigation" (Docket No. G-580) (1948), pp. 336-337, 339, 340-341, 344). Petitioners have contented themselves with claiming that Mississippi who paid the excess charges does not have the equities in its favor which the Court below found. Petitioners have not shown any equity, let alone superior equities in their favor.

The plain answer to whether the Court below attended to the opinion of this Court on the law of the case can best be ascertained by a reading of that clear and concise pronouncement. There can be no doubt that the Court below did everything within its power to permit all parties to show facts, law or equity in their favor. Petitioners, like those others so situated, and like the Illinois Commerce Commission, failed to do so. In spite of this, the Court below made a careful analysis of the complete situation and came forth with the only possible judgment. This case presents nothing new, nothing novel, and nothing important in natural gas jurisprudence. There is no conflict or confusion except in the minds of petitioners who object to the fact that they did not receive any share in the refund to which they have not proven any claim either in law or equity.

Conclusion.

For the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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OCT 16 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 360

ILLINOIS COMMERCE COMMISSION,
Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS COMPANY, LACLEDE STEEL COMPANY, OLIN INDUSTRIES, INC., OWENS-ILLINOIS GLASS COMPANY, SCULLIN STEEL COMPANY, INTERSTATE NATURAL GAS COMPANY, and FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Attorney General of the State of Illinois, as attorney for and on behalf of the Illinois Commerce Commission, prays that a writ of *certiorari* issue to the United States Court of Appeals for the Fifth Circuit to review its judgment and decree entered on July 15, 1950, in the case there entitled *"Interstate Natural Gas Company* v. *Federal Power Commission, et al.,"* No. 10701 on the docket of said court.